No. 22545

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD TYSK, INDIVIDUALLY AND AS MONTANA STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, AND STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR,

Appellants

v.

HENAULT MINING COMPANY,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR APPELLANTS

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OPINIONS BELOW

The opinions of the Hearing Examiner and the Bureau of Land Management appear in the reproduced record at pages 11-24 and 25-31, respectively. The Secretary of the Interior's opinion (R. 32-52) is reported at 73 I.D. 184. Chief Judge William J. Jameson's opinion (R. 138-150) is reported at 271 F.Supp. 474.

JURISDICTION

Judgment was entered on August 28, 1967 (R. 152). Notice of appeal was filed October 23, 1967 (R. 155). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether Henault established a valid discovery on the effective date of the Multiple Surface Uses Act of 1955, without showing physical exposure of valuable mineral deposits within the limits of its claims, which would operate to deny management of the nonmineral surface resources by the United States pursuant to that Act.

2. Whether the Secretary's decision, that Henault had not as yet made a valid discovery, was supported by substantial evidence on the record as a whole and should have been affirmed.

STATUTES INVOLVED

Section 1 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2319, 30 U.S.C. sec. 22, provides in pertinent part:

> That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 2 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2320, 30 U.S.C. sec. 23, provides:

> That mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end-lines of each claim shall be parallel to each other.

Section 4 of the Multiple Surface Uses Act of 1955, 69 Stat. 368-369, 30 U.S.C. sec. 612, provides:

> (a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> (b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to

manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall,

> prior to issuance of patent therefor, sever, remove or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceding subsection (b). Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

STATEMENT OF THE CASE

This action was instituted by the Henault Mining Company in November 1966 to reverse the Secretary's decision that the United States was entitled to manage the vegetative and othe nonmineral surface resources on Henault's 18 contiguous, unpatented lode mining claims, pursuant to Section 4 of the Multiple Surface Uses Act of 1955, supra (R. 2).[1/] The district court reversed the Secretary's decision by summary judgment (R. 152). The basic facts are undisputed and may be summarized as follows:

Henault located 21 mining claims prior to July 1955 on federal lands in the Black Hills of South Dakota (R. 3). The claims are adjacent to the Homestake Mining Company's patented

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1/ Henault asserted the jurisdiction and venue of the district court to be founded on the Administrative Procedure Act, 5 U.S.C. (1964 ed.) Supp. II, secs. 701-706; The Declaratory Judgment Act, 28 U.S.C. secs. 2201-2202; the "mining laws," 30 U.S.C secs. 21 et seq.; the Multiple Surface Uses Act of 1955, supra; "43 U.S.C. secs. 1-15;" and the Fifth Amendment, U.S. Const. Jurisdiction and venue were also alleged to be based on 28 U.S.C secs. 1361 and 1391(e), respectively. (R. 2.) We agree that 28 U.S.C. sec. 1361 confers a limited jurisdiction on the district court over actions in the nature of mandamus to compel a federal officer or employee to perform a ministerial duty. Sinc this is so, we do not brief reasons why other bases alleged for jurisdiction are erroneous.

mining claims, that company being the largest gold producer in the United States.

This proceeding originated in the Department of the Interior, pursuant to the Multiple Surface Uses Act of 1955, supra. The United States maintained that it was entitled to manage the nonmineral surface resources because Henault had not made a discovery of valuable minerals within the limits of its unpatented claims. (R. 3, 11.)

In the proceedings before the Hearing Examiner, Henault averred that it had expended approximately $57,000 in assessment work on the claims since 1945 (R. 24).[2/] Henault's testimony focused on the geology of the area which it said favored exploration at depth, at an estimated drilling cost of $360,000 to $480,000, with indications that the Homestake formation in some form may run through its claims at depths of 3,500 to 4,000 feet (R. 13, 14, 37, note 1). Both the Government and Henault introduced assays of samples taken from the surface of the claims, which indicated "similar results" (R. 19-21). The Hearing Examiner found that, although Henault had not uncovered any mineral deposits which can be worked at a profit, a discovery had been made on the claims in question (R. 12, 16).[3/]

2/ Henault's proposed finding of the amount of assessment work was rejected by the Hearing Examiner as being immaterial to the issue of discovery (R. 22, 24).

3/ The Government recognized the rights asserted by Henault as to two of the 21 claims and Henault did not appeal from the ruling of nondiscovery as to the Automobile claim, thus leaving 18 claims in dispute in subsequent proceedings in the Department of the Interior, the district court and here (R. 3-4, 16, 25, 28-29, 33-34, 39, 138).

On appeal by the United States, the Bureau of Land Management reversed. It ruled, inter alia, that Henault's "testimony and exhibits at most indicate that the mining claims involved warrant further exploration to determine whether the Homestake formation is under the claims and whether it is sufficiently mineralized" (R. 28).

Henault appealed to the Secretary, who affirmed (R. 32-52), observing that geological inference standing alone has never been accepted as a substitute for actual exposure of valuable minerals in order to constitute a discovery (R. 38-39). The Secretary commented that Henault "has failed to distinguish between 'exploration' and 'development' and that it has ignored the long-recognized requirement that the vein or lode upon which a discovery is based must be exposed within the limits of each claim" (R. 43). Answering Henault's suggestion that BLM "has required the actual development of a valuable mine with proven ability to produce at a profit," the Secretary said that "the second stage of a mining venture, the exploration, must have satisfactorily progressed to the point at which the further expenditure of money and effort for the third phase [development] may be favorably contemplated" (R. 45). He noted that Henault, by its own testimony, had not entered upon the exploratory stage (R. 43-45), and that "until the recommended exploratory steps

are taken, there would appear to be no basis for determining whether a prudent man would be justified in expending money and effort with a reasonable expectation of developing a profitable mine" (R. 46). The Secretary concluded (R. 51-52):

> the determination here need not prevent further efforts by the appellant to explore and develop the mineral deposits which may be found within the limits of its claims. The appellant is free to undertake the drilling program recommended by Wright. As long as the land remains open to the operation of the mining laws, the claimant is protected in its right to such deposits as may be found, but until a patent is issued, its use of the land embraced by the claims is limited to mining and other uses of the land incidental to mining.

Henault then filed this action in the court below (R. 2-10). On cross-motions for summary judgment (R. 62, 83), the district court reversed, concluding that the Secretary's decision "was based on an erroneous legal theory and is not in accordance with law" (R. 150). While seeming to agree that geological inference standing alone is insufficient to constitute a discovery (R. 144-145), the court said (R. 146): "In my opinion the Government has in effect required 'a showing of commercial value' in this case." It rejected the Secretary's distinction between "exploration" and "development" (R. 147-150). Summary judgment, reciting that the Secretary's decision was "arbitrary, capricious and an abuse of discretion * * *," was then entered (R. 152-153). This appeal followed.

SUMMARY OF ARGUMENT

I

Introduction. The restricted decision of the Secretary accords with the purposes of the Multiple Surface Uses Act of 1955. It did not invalidate Henault's mining claims, but merely declared that Henault had not made a valid discovery. The decision expressly recognized Henault's continued right to explore and to use surface resources incidental thereto. The only result of the Departmental decision was to permit government use of the surface for other purposes subordinate to Henault's mining operations.

A. To constitute a valid discovery, the mineral lode claimant is required to physically expose, within the limits of his claim, a vein or lode of mineral-bearing rock in place possessing in and of itself a present or prospective value for mining purposes. Speculation, hope, and the like have been held insufficient over and over again. This standard has been repeatedly stated by the Supreme Court, this Court and other court It is also supported by a long history of consistent administrative construction of the relevant statutes.

B. In the case at bar, the undisputed facts show that Henault had not actually uncovered a valuable mineral deposit within the limits of its claims. The mineralization found was concededly valueless. The Secretary therefore correctly ruled that Henault had not as yet established a valid discovery.

The geological information, relied upon by the district court in overruling the Secretary, suggests only that additional exploratory work be done to ascertain whether a deposit does in fact exist within the limits of Henault's claims, so as to raise the issue whether, under the prudent-man standard, any mineral that might be found constituted a valuable deposit. The Secretary's decision does not preclude such work. Moreover, Henault may not have a right to mine the particular formation containing gold which it hopes lies at depth within its claims, under the "apex law" of mining.

The district court's result is founded on speculation and departs from settled law.

C. Assuming that Henault had exposed a mineral deposit, it is plain that the Secretary was correct in deciding that Henault had not made a valid discovery. The evidence is clear that nothing of value has been found. The prudent-man standard requires a showing of valuable minerals. It follows that Henault failed to show a valid discovery under that standard.

II

Since the Secretary applied the correct standards and his decision rests on substantial evidence, the district court was not warranted in rejecting the Secretary's conclusion.

ARGUMENT

I

THE DISTRICT COURT ERRED IN RULING THAT HENAULT HAD MADE A DISCOVERY OF A VALUABLE MINERAL DEPOSIT WITHIN THE LIMITS OF ITS CLAIMS

Introduction. We believe the decision below disregards the nature and consequences of the proceedings in the Department of the Interior and the Secretary's decision. The proceedings were instituted, not to divest Henault of its mining claims, but to determine management and disposal rights of surface resources pursuant to the Multiple Surface Uses Act of 1955, supra.[4/] This necessitated inquiring as to whether a valid discovery of minerals had been made. It was undisputed that Henault has not as yet uncovered any mineral deposits on its claims.

In ruling that Henault had not made a valid discovery, the Secretary carefully specified that his determination did not prejudice Henault's rights to further exploration, to such deposits as may be found, and to use the surface resources incident

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4/ This Court, in Funderberg v. Udall (No. 21884, June 11, 1968) not yet reported, discussed some purposes of the 1955 Act. One purpose was to provide "for conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent land * * *." Section 5 of the 1955 Act established an in rem "procedure for determining expeditiously title uncertainties resulting from the existence of abandoned, invalid, dormant, or unidentifiable mining claims, located prior to the enactment of the bill." 2 U.S.C. Cong. and Admin. News, 84th Cong., 1st sess. (1955) pp. 2474-2475, 2483-2484. While the record does not disclose when Henault first entered upon these claims, Henault has alleged that it has done assessment work for over 20 years (R. 3, 24).

to mining (R. 51-52). If and when Henault does find a valuable mineral deposit and its claims go to patent, the Government's rights in the surface resources will cease. Cf. Davis v. Nelson, 329 F.2d 840, 845, 847 (C.A. 9, 1964). Thus, no forfeiture is involved. Further, even without the 1955 Act, the use of the surface of mining claims is limited to uses connected with mining. United States v. Etcheverry, 230 F.2d 193, 195 (C.A. 10, 1956); Teller v. United States, 113 Fed. 273, 280-284 (C.A. 8, 1901); United States v. Rizzinelli, 182 Fed. 675, 681-684 (D. Idaho 1910). The 1955 Act thus declared existing law and implemented it pursuant to a declared policy of more rigorous enforcement of limitations on the rights of mining claimants.

Assuming Henault does not intend to use the surface for some impermissible purpose, the basis for Henault's and the district court's quarrel with the narrow, limited Secretarial holding is indeed elusive.[5/]

A. Settled law requires a physical rather than a theoretical demonstration that a mineral deposit exists. - Since 1872 the federal mining laws have authorized citizens to explore, discover and extract valuable minerals from the public domain and to obtain fee title to lands containing such discoveries.

5/ We do not imply that there is record indication that these claims are sought for a purpose other than their potential mineral value.

Section 1 of the Act of May 10, 1872, supra. The obvious intention has been to stimulate and encourage the development of the nation's mineral wealth by rewarding the successful prospector with the opportunity to acquire, at a price of $2.50 an acre for placer claims and $5.00 an acre for lode claims,[6/] title to the land in which the minerals are discovered. To qualify for that reward, the prospector must show that he has made a "discovery" of a "valuable mineral deposit." In the case of a mining claim on a vein or lode, Congress specified that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Sectio 2 of Act of May 10, 1872, supra.

Interpretation and application of those terms have been the task of the Department of the Interior which, acting "as a special tribunal," is authorized to administer the laws "regulating the acquisition of rights in the public lands," and of the Secretary of the Interior who is "charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved * * *." Cameron v. United States 252 U.S. 450, 460 (1920); Best v. Humboldt Mining Co., 371 U.S. 334, 337 (1963); United States v. Coleman, 390 U.S. 599, 600, note 1 (1968); Palmer v. The Dredge Corp. (C.A. 9, Nos. 21435 and 21436, June 26, 1968) not yet reported.

6/ R.S. secs. 2325 and 2333, 30 U.S.C. secs. 29 and 37; 43 C.F.R. (1967 rev.) secs. 3453.6 and 3470.1.

Judicial as well as administrative decisions show that, except in controversies avoiding subversion of the intent of the mining laws or not adversely affecting the public interest in federal lands, the lode claimant has been required to physically expose, within the limits of his claim, a vein or lode of mineral-bearing rock.

1. It was early held by the Supreme Court that the requirements for a discovery were not satisfied by "mere indications" of the vein, lode or deposit. In Iron Silver Mining Co. v. Reynolds, 124 U.S. 374, 384 (1888), a contest between placer and lode claimants, concerning a statute excepting from a placer patent veins or lodes "known to exist," it was stated:

> The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact. [Emphasis by the Court.]

The Court there emphasized the "wide difference" between belief and knowledge.

The decision in United States v. Iron Silver Mining Co., 128 U.S. 673, 683-684 (1888), was the same. Justice Field declared (at 676): "There must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question. The form also in which the mineral appears, whether in placers or in veins, lodes or ledges, must be disclosed so far as ascertained." Justice Field continued (at 683):

> It is not enough that there may have been some indications by outcroppings on the surface, of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. * * *

Other such cases of that early era recognized the insufficiency of speculation or belief. Iron Silver Co. v. Mike & Starr Co., 143 U.S. 394, 402-403, 405-406 (1892), and dissenting opinion, 412, 421, 424-425, 430;[7/] Sullivan v. Iron Silver Mining Co., 143 U.S. 431, 435-436 (1892).

Specifically regarding Section 2 of the 1872 Act, supra, the Supreme Court in 1885 had stated earlier, "The discovered lode must lie within the limits of the location which is made by reason of it." Gwillim v. Donnellan, 115 U.S. 45, 50 (1885). This requirement was repeated in 1889, with the statement that discovery of a lode outside the boundaries of a claim "does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them." Dahl v. Raunheim, 132 U.S. 260, 263 (1889).

Failure to expose the vein or lode within the limits of the claim was the keystone for the Court's resolution of the problem whether a tunnel owner must adverse the patent applicati

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7/ The Court was agreed on such insufficiency but divided "upon questions of fact." Chrisman v. Miller, 197 U.S. 313, 321-322 (1905).

of a surface lode claimant, the Court saying that a tunnel is not a mining claim but only a means of exploration and that "Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface." Mining Co. v. Tunnel Co., 196 U.S. 337, 360 (1905). As Justice Van Devanter stated in Cole v. Ralph, 252 U.S. 286, 295 (1920): "While the two kinds of location--lode and placer--differ in some respects, a discovery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral (§2320), and to sustain a placer location it must be of some other form of valuable mineral deposit (§2329), one such being scattered particles of gold found in the softer covering of the earth. * * *" "Holding and prospecting" would not support a right to patent, he said (at 307), "for that would subject non-mineral land to acquisition as a mining claim."

At the same term of Court, in Cameron v. United States, 252 U.S. 450, 456, 459 (1920), Justice Van Devanter made clear that physical exposure was necessary under Section 2 of the 1872 Act (at 456): "To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located, Rev. Stats., § 2320 * * *."

The particular parties, the object of the proceeding, the mineral, and the statutory language may of course operate to relax the requirement of physical exposure. Such was the holding of Diamond Coal Co. v. United States, 233 U.S. 236 (1914), a suit by the United States to annul a patent as having been fraudulently obtained. Coal was the mineral involved. The statute there excepted "mineral lands" and "lands valuable for minerals" from patent application. Justice Van Devanter wrote (at 239-240):

> 3. To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and quantity as would render their extraction profitable and justify expenditures to that end. * * *

The evidence of fraud in obtaining the patent was deemed overwhelming (at 242-247), and while it was nowhere declared that a "discovery" of coal had been made which would meet the standard applicable to other statutes and circumstances, the Court concluded that the lands were "mineral lands," even though there had been no exposure of coal upon the particular lands. In reaching this result, the Court was impressed with the blatancy of the fraud, the particular mineral, and the language of the statutes involved, explaining (at 249):

> There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries.
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> * * * * *
>
> It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines.

2. This Court has also decided that the claimant must physically expose minerals within the limits of the claim. In Multnomah Mining, Milling & D. Co. v. United States, 211 Fed. 100 (C.A. 9, 1914), the United States alleged that the lands were not mineral in character and that no mineral in paying quantities had been discovered thereon. This Court declared (at 101):

> There is doubtless in the land in controversy a small quantity of fine gold, such as may be found in all the lands along the Columbia river from its headwaters to the ocean. But the proof is convincing that no gold in paying quantities has been discovered on these claims. If the land included in these placer claims was mineral land, or contained mineral sufficient to justify mining, that fact was capable of demonstration. * * *

This Court answered (at 101) the claimant's contention that use of a different mining process might produce satisfactory production: "But the suggestion is a mere conjecture, based on no tangible or scientific evidence, and it does not avail to sustain

the validity of mining claims which were so evidently initiated without the discovery which the law requires." In concluding that there had been "no discovery," the Court referred (at 102) to its opinion in Steele v. Tanana Mines R. Co., 148 Fed. 678 (1906), that securing "colors of gold, 'and in some instances fairly good prospects of gold'," is insufficient.

In Steele, a contest between mineral and homestead claimants, this Court characterized the evidence as follows (148 Fed. at 679-680):

> The sum and substance of this evidence is, not that gold had been discovered on the claim in such quantities as to justify a person of ordinary prudence in further expending labor and means with a reasonable prospect of success, but that colors of gold had been found which were fairly good prospects of gold. Doubtless, colors of gold may be found by panning in the dry bed of any creek in Alaska, and miners, upon such encouragement, may be willing to further explore in the hope of finding gold in paying quantities. But such prospects are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land when it comes to a contest between a mineral claimant and another claiming the land under other laws of the United States.
> * * *

See also Adams v. United States, 318 F.2d 861, 870 (C.A. 9, 1963

3. Other courts have reached the same conclusion. In Waterloo Min. Co. v. Doe, 56 Fed. 685, 689 (S.D. Cal. 1893), the court held that no discovery had been made, where the vein or

lode had not been found within the boundaries of the claim, although three tons of silver-bearing rock, yielding $600, had been extracted and even though there was "hope" of finding the vein or lode at some future time. "Mere outcroppings, whether appearing on the surface or in shallow works near the surface, do not satisfy the quantum of discovery." United States v. Mobley, 45 F.Supp. 407, 409-410, 413 (S.D. Cal. 1942). See also Oregon Basin Oil & Gas Co. v. Work, 6 F.2d 676-678 (C.A. D.C. 1925), aff'd per curiam, 273 U.S. 660.

Judge Christensen discussed the requirement of physical exposure of the vein or lode within the limits of the claim in the recent case of Ranchers Exploration and Development Co. v. Anaconda Co., 248 F.Supp. 708, 714, 716-720 (D. Utah 1965). He said (at 714): "To constitute a mineral discovery, something more than conjecture, hope or even indication of mineralization is essential * * *." He then stated (at 714-715):

> And while liberality in applying these rules will be indulged in determining superiority of rights as between private claimants, and there may be taken into account the geological indications and other discoveries in adjacent areas, as well as utilization made of developing technological aids, these of themselves may not be substituted for discovery of minerals within the exterior boundaries of the claim in question, as that discovery may be so aided. Otherwise, established public policy for the promotion of mineral resources through recognition of diligence

> as distinguished from speculation or monopoly could be frittered away and an express statutory requirement nullified without the comprehensive congressional re-evaluation and redirection that seem especially requisite in this field for any such basic change. [Footnotes omitted.]

"Decisions regarded as the most liberal would not countenance" a finding of discovery based on inference from "geological indications in the general area" (at 717). Repudiating (at 720) "pyramiding of an inference upon an inference, to merely infer as to an entire group of claims mineral discoveries on each because of geological trends or other discoveries somewhere in the group of claims," he required discovery within each claim. Concerning a plan for further exploration, modern methods, and advancing technology, he commented (at 717), "What might be established through future exploration will not evidence discovery at a prior date unless the existing circumstances have amounted to a discovery," and he labeled as "fallacious" (at 718) "The idea that large areas of public land may be privately pre-empted and withheld from everyone else by a mere paper plan for exploration," because that idea "would be the unwarranted judicial acceptance of speculative monopolization in lieu of mineral discovery" (at 719).

Other recent pronouncements on the requirement of actual exposure are those of the Tenth Circuit in Udall v. Snyder

and Udall v. Garula (Nos. 9671 and 9681, respectively, May 24, 1968) not yet reported. Responding to an argument based on geological indications, it said in Snyder:

> Of no determinative concern in this case are refinements of evidentiary problems concerning the extent to which resort may be had to technological aids and inferences in the modern context on the basic issue of mineral discovery as now defined by the Supreme Court.
> * * *

4. To give effect to the terms "valuable" and "discovery" and the mandate contained in Section 2 of the 1872 Act, supra, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," the Secretary also has long required actual and physical exposure of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes, and has rejected geological inference alone to establish existence of minerals. In East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911), the claimant's civil and mining engineer deposed (at 272) that the claims were located in an established mining district and that the surface mineral indications on the claims (when combined with his knowledge of the geological conditions of the district) suggested that valuable ore would be found at depth. No development of anything found was contemplated. The Secretary ruled (at 273-274):

It is evident from the record before the Department that the deposits alleged to have been exposed on these claims are regarded by the applicant as possessing practically no economic value, but that, on the other hand, title to the claims is sought essentially on account of their possible value for certain unexposed deposits supposed to exist at considerable depth beneath the surface, and having no connection, so far as shown, with any deposits appearing on the surface. The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes; and before patent can properly be issued or entry allowed thereon, that fact must be shown in the manner above stated.

The showing made by the claimant in the present case, even if it be regarded as supplemented by the report of the special agent, above referred to, is manifestly too vague, general and indefinite to warrant its being accepted as fulfilling the requirements above set forth, or as establishing the existence of a valid discovery of mineral upon any particular one or more of the claims embraced in the entry. For this reason, therefore, and aside from any other consideration, the entry, in its entirety, will be canceled.

On rehearing, it was stated (41 L.D. 255-256):

> Reading this petition in connection with the prior decision of the Department (40 L.D., 271) makes it evident that patent for these claims is being sought for the purpose of developing supposed deposits of ore--which we may call lodes--well below the surface of the ground, and that there is no claim that the deposits which it is intended to develop have been in fact discovered. The so-called discoveries on the surface of the various claims are supposed to indicate that other and unconnected veins or lodes lie at a greater depth. In other words, in these cases there is an apparent attempt to substitute observation, combined with geologic inference, for discovery. Whatever may be thought of its policy Congress has said in section 2320 of the Revised Statutes: "but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Obviously, the words "the vein or lode" can only refer to the lode which it expected to develop and mine and cannot refer to disconnected bodies of ore of no possible value in themselves. Congress having laid down this rule for the guidance of the Department, the Department can do nothing but follow the will of Congress in this particular. If the rule is in general, as has been insisted, too narrow a one, or if it does not fit particular localities, obviously the remedy is to be sought at the hands of Congress; and it would be usurpation of authority in this Department to attempt to amend, directly or indirectly, the unmistakable language of the statute.
>
> The question whether before patenting of a lode claim ore must be exposed of commercial value, which is somewhat elaborately discussed by counsel, is manifestly not in point. Any question as to the character of the vein or lode can only arise after the vein or lode on account of which patent is desired has been discovered. 8/

8/ Subsequent showing by the claimant of the existence of the vein or lode within the limits of its claims resulted in vacation of the cancellation. East Tintic Consolidated Mining Co., 43 L.D. 79, 81-82 (1914).

The testimony in Rough Rider and Other Lode Claims, 41 L.D. 242, 246 (1911) was "that it would be unprofitable to attempt to operate them [the claims] for iron, and that their only value lies in the fact that, in connection with other conditions disclosed upon the claims, and elsewhere in the district, they afford indications of the existence of other deposits at depth, valuable for copper mining purposes." The testimony was thus characterized (at 251):

> It is manifest from the showing herein made that the mineral-bearing quartz which, it is testified, was found on some of the claims in question, possesses no value whatsoever, either present or prospective, for mining purposes. Indeed, in the brief filed in the case in behalf of the entryman, it is expressly conceded that "the witnesses for the mineral entryman do not claim that the mineral discovered has any actual value in itself, or that mines could be successfully worked for the mineral discovered. The attorneys for the mineral entryman do not make such a claim."

Surface indications of minerals together with geological conditions of the area were held inadequate to support a discovery. 41 L.D. at 253-254.

Discussion of the essential ingredients of a valid discovery often includes the Secretary's formulation in Jefferson-Montana Copper Mines Co., 41 L.D. 320, 323-324 (1912):

> After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:
>
> 1. There must be a vein or lode of quartz or other rock in place;
>
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
>
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.
>
> It is clear that many factors may enter into the third element: The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

Two of the claims there were rejected because "the testimony fails to disclose its [the vein or lode's] existence," though a plat showed a mineralized dike on the two claims. Three other claims were validated because "there has been a valid discovery of a vein or lode." 41 L.D. at 324.

The mining claimant's geologist and expert witness, in United States v. Edgecumbe Exploration Co., Inc., A-29908 (May 25, 1964), Gower Federal Service SO-1964-27 (Mining), was

of the opinion that continued exploration would result in the finding of valuable gold deposits in an established gold production district, although assays of the surface showings showed only small values. Citing Interior decisions, the Secretary stated the difference between exploration and development, noted that the company did "not claim to have found a deposit which in itself has value for mining purposes," and said:

> The exposure of substantially worthless deposits on the surface of a claim, the finding of mere surface indications of mineral within its limits, the discovery of valuable mineral deposits outside the claim, or deductions from established geological facts relating to it, one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself value for mining purposes. East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911).

The evidence and the contention made clear that "The question is not whether the gold discovered by the claimant is marketable but whether such a gold deposit has been found which would justify the development of a mine." See also United States v. Hurliman, 51 L.D. 258, 261 (1925); United States v. Converse, 72 I.D. 141, 149-151 (1965), aff'd sub nom. Converse v. Udall,

262 F.Supp. 583 (D. Ore. 1966), awaiting decision on appeal (C.A. 9, No. 21697); United States v. Snyder, 72 I.D. 223, 226-230, 232 (1965), aff'd per curiam, Udall v. Snyder (C.A. 10, No. 9671, May 24, 1968) not yet reported; United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235, 236-238 (1961).

It is clear, we submit, that the decided cases, both judicial and administrative, compel the claimant to physically expose, within the limits of his claim, a vein or lode of mineral-bearing rock in place possessing in and of itself a present or prospective value for mining purposes.

B. The undisputed facts show that Henault had not physically exposed a mineral deposit within the limits of its claims. - In the case at bar, the Secretary reviewed the basis for Henault's claim of a discovery, which review was expressly accepted by the district court (R. 34-38, 39, 42-43, 46-47, 142-144):

> The basic facts concerning the location, ownership, workings and surface mineralization of the claims are not in dispute. The claims were all located prior to July 23, 1955, and are presently owned by the appellant. At the hearing, both the Government and the mining claimant presented in evidence assays of numerous samples of minerals which were taken from the claims by Ernest T. Tuchek, a geologist employed by the Bureau of Land Management, and by Ernest Shepherd, a geologist working under the supervision of Lawrence B. Wright, a consulting geologist retained by the mining claimant. The samples were taken from various pits, cuts and adits on the claims during extensive examinations by the two geologists and were assayed for gold and silver values.

The Government's case was based solely upon the results of the surface examination and upon the lack of evidence disclosed by such examination of the existence of a vein or lode from which one might reasonably hope to develop a profitable mine. The appellant's case, on the other hand, was based primarily upon the testimony of Wright, who examined the appellant's claims in 1948 and in 1961 and made specific recommendations for further mineral exploration on the claims and whose deposition, taken at San Francisco, California, on October 3 and 4, 1963, was admitted in evidence over the vigorous protest of counsel for the Government.

The hearing examiner found from the testimony that the two geologists (Tuchek and Shepherd) met occasionally during their examinations but that their work was entirely separate, that they did not necessarily sample in precisely the same places but that a comparison of the values found in their samples revealed, within the limits of human tolerance, similar results. He noted that, although the gold and silver content of the samples taken varied from trace amounts to a high of $15.87 per ton in one sample, the values found in the great majority of the samples ranged from 9 cents to less than $1.00 per ton. The examiner found this evidence to be conclusive that there are exposed within the limits of each claim, except the Automobile lode, veins or lodes of rock in place containing some amounts of gold and silver, and he found the evidence to be conclusive that there is no surface exposure of minerals on any of the claims which can be mined at a profit.

The examiner further found that all of the experts in the field of geology who appeared at the hearing testified that the land upon which the claims are situated is mineral in character, that the claims are surrounded by patented mining claims and that they lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. He found that appellant's witness Wright has an intimate knowledge of the geology of the area, that he

was employed by the Homestake Mining Company from 1919 to 1931, for the last six years of that period as chief geologist for the company, that he is thoroughly familiar with all of the mining and geologic technical publications on the Black Hills region and that he conducted and supervised the examination of the Henault claims which culminated in the 1948 and 1961 reports. He then summarized Wright's conclusions as follows:

> "1. That the Henault Mining Company's claim group lies within the province of major gold mineralization in the Black Hills.
>
> 2. That the claims lie adjacent to the country's greatest producer of gold which is of no significance except that the geologic structural relations are such that the proximity has real value.
>
> 3. That the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in such a manner that the possibility of deep ore deposits such as are being developed by Homestake may reasonably be expected at minable depths at Henault.
>
> 4. The values in gold and silver existing in Henault ground can only lead to the conclusion that these surface expressions are 'upward leaks' effected at the time of mineralization from substantial deposits below.
>
> 5. That the tertiary dike zone through the center of the Henault claims emplaced in an anticlinal structure (believed to elevate the favorable Homestake formation closer to the surface) is additional incentive to moderately deep exploration for substantial amounts of ore.
>
> 6. That all Henault holdings are of mineral character and, considering that almost all surrounding grounds have been patented, are entitled to the same consideration for patent."

The examiner then noted that Wright recommended that at least three holes be drilled to a depth of 3500 to 4000 feet to probe for minerals at depth. The soundness of Wright's recommendations was attested to by Professor Edwin H. Oshier, a mining engineer and head of the Department of Mining Engineering at the South Dakota School of Mines and Technology, who had not personally examined the claims but whose opinion was based upon a review of Wright's reports and upon Wright's reputation as an authority on the geology of the northern Black Hills.

The examiner found that, although the qualifications of the Government's expert witnesses could not be questioned, neither of the two witnesses who testified in behalf of the Government had as thorough a knowledge of the geology of the area as did Wright and that, from a geologic standpoint, their examinations did not approach those of Wright in thoroughness. He, therefore, accepted the recommendations of Wright as to the possibilities for following the veins or lodes on the surface of the Henault claims as being the best available information upon which a prudent man would rely. * * *

* * * * *

The hearing examiner then found that it had been established that on each of the claims, except the Automobile, there are veins of rock in place containing valuable minerals and that, although most of the assays revealed nominal or very low values which could not in any sense be considered worthwhile to mine, the mineralization was there, and, in view of the favorable geology of the area, he concluded that there had been a discovery on each of those claims. He acknowledged that his conclusion rested squarely on the acceptance of Wright's recommendations. * * *

* * * * *

There is essentially no dispute as to the facts of this case. It has not at any time been suggested that a workable mineral deposit has been uncovered on any of the claims in question or that any exposed area on the claims is a part of a vein or lode which, in itself, appears to contain values which would warrant efforts to develop a valuable mine. On the other hand, no effort was made by the Government to challenge the validity of the findings or the recommendations of appellant's witness Wright. Only the legal effect of his findings is challenged, and the sole issue in this appeal is whether those findings, considered alone or with the established facts of the case, are sufficient to constitute a discovery under the mining laws.

* * * * *

Factually, appellant's claim of a discovery is based on the following: The mineral values in the area are found in the Homestake formation which has been extensively mined for gold by the Homestake Mining Company on adjoining property. The Homestake formation dips toward appellant's claims and outcrops at some distance beyond the claims. Because of this Wright testified that he believed that the formation extends beneath the Henault claims. The formation does not outcrop on the claims but a number of Tertiary dikes do. These dikes are believed to originate below the Homestake formation and to penetrate that formation on their way to the surface. The slight mineral values found in the dikes by the extensive sampling are believed to represent leaks from the minerals in the Homestake formation. However, the really valuable mineral deposits are expected to be found at the intersections of the dikes with the Homestake formation and it is to establish this that Wright recommended the drilling of three holes to depths of 3500 to 4000 feet. Wright deposition, pp. 50-59.

> There is no contention that the Homestake formation has actually been exposed on any of the Henault claims. There is also no contention that the Tertiary dikes or intrusions carry valuable mineral deposits. They are claimed merely to establish that the Homestake formation, which is believed to carry the valuable deposits, lies below the surface, possibly a few thousand feet down.

The factual basis may thus be summarized: The exposed mineralization is valueless. No ore has been removed. While assessment work has been done for over 20 years, no development and operating expenditures have been made. Not only has no ore body been exposed, but there is no proof at all whether an ore body actually exists within the limits of the claims. The most that can be said for the indications of mineralization or geological inferences is that they have led to an expert recommendation that further exploratory work be done to ascertain whether valuable minerals do in fact exist on these claims at depth. The Secretary's restricted decision does not prejudice execution of that recommendation.

Moreover, the geological information does not totally favor Henault. Assuming, for argument purposes only, that the Homestake formation does lie at depth on Henault's claims, Henault cannot now say with any degree of definiteness that it would in law be entitled to mine the deposit. Depending upon the manner in which the Homestake formation manifests itself at depth within some or all of Henault's claims, it may well be that the Homestake Mining Co. could follow the formation from its

patented claims and would have rights superior to Henault's, under the "apex law" of mining. Section 3 of the Act of May 10, 1872, 17 Stat. 91, R.S. sec. 2322, 30 U.S.C. sec. 26; 1 American Law of Mining (1967) sec. 4.36, pp. 661-662. Henault did not and cannot at this time demonstrate the contrary.

Although the Hearing Examiner considered this, his discussion and conclusion (R. 17-18), that "the best evidence available at this time indicates that the Henault Mining Company would have title to mineral values found in the Homestake formation beneath its claims," emphasize the tenuousness of the technical information on which the geological inference rests in this case and the present uncertainty of Henault's claims. The "best evidence" of which he speaks concedes that "Geologically the problem is too complex to cover adequately in a report of this nature" (R. 17). This factor of present speculation supports the holding of the Secretary.

While the district court states its agreement that geological inference standing alone may not be accepted as a substitute for discovery (R. 144), it is apparent that its result can only be founded on geological inference which rests in turn upon assumption--an inference as to quality and quantity based upon an assumption, rather than proof, that a valuable mineral exists at all. It is equally clear that the court has in fact discarded the requirement that there be actual and physical exposure of mineral-bearing rock in place, possessing

in and of itself a present or prospective value for mining purposes. This is contrary to the applicable principles of law.

C. Even assuming some deposit exists, there was absolutely no showing that it was "valuable." - The entire thrust of the statutes involved and the decided cases is that the deposit must be shown to exist, as we have discussed. Once existence is established, it must then be demonstrated that the deposit is "valuable." Demonstration of "value" is an integral part of the prudent-man standard of determining whether a valid discovery has been made.

In Chrisman v. Miller, 197 U.S. 313, 320 (1905), the Supreme Court ruled that the testimony "does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration." It quoted (at 321) Section 2 of the 1872 Act, supra, and observed that Interior had since laid down the rule of discovery in Castle v. Womble, 19 L.D. 455, 457 (1894), which it approved (at 322). Willingness on the part of the locator to further expend his labor and means was rejected (at 322-323) as a fair criterion of a discovery, as was "a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.'" The Court said (at 323) that even where the controversy is between mineral claimants and the rule regarding discovery is more

liberal than where the contest is between mineral and agricultural entrymen or between a mineral claimant and the United States, "there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."[9/]

9/ The Supreme Court thus pointed to the importance of the particular contestants in ascertaining whether a discovery has been made. The subject is relevant to this case in connection with the Secretary's distinction between "exploration" and "development" (R. 43-44). The district court, relying on Lange v. Robinson, 148 Fed. 799 (C.A. 9, 1906); and Charlton v. Kelly, 156 Fed. 433 (C.A. 9, 1907), disagreed (R. 147-149). In neither case did this Court say that the words were synonymous in all situations. Charlton referred to the words as "equivalent" as used by the trial court in a contest between rival mining claimants, citing Chrisman v. Miller, supra. Moreover, as the Secretary observed and as the district court ignores, Henault's own witness recognized the distinction in this case (R. 44-45). The distinction is generally acknowledged. Santa Fe Pacific R. Co. v. United States, 378 F.2d 72, 76 (C.A. 7, 1967); Converse v. Udall, 262 F.Supp. 583, 594-596 (D. Ore. 1966), awaiting decision on appeal (C.A. 9, No. 21697).

That the issues are different in a dispute between mining claimants is beyond question. Neither would deny the existence of the lode or even its value. The issue is usually simply the identity of the discoverer. When the United States contests a mining claim, however, "existence" and "value" are crucial issues. To obliterate the Secretary's distinction and to apply the more relaxed standard of private mining contests to proceedings involving the United States would, we submit, facilitate easy acquisition rights in or title to public property unsupported by any previous judicial or administrative warrant. See the discussion in Davis v. Nelson, 329 F.2d 840, 844-846 (C.A. 9, 1964); Steele v. Tanana Mines R. Co., 148 Fed. 678, 680 (C.A. 9, 1906); Jose v. Houck, 171 F.2d 211, 212 (C.A. 9, 1948); Ranchers Exploration and Development Co. v. Anaconda Co., 248 F.Supp. 708, 714, 719 (D. Utah 1965).

The most recent pronouncement by the Supreme Court to this effect is United States v. Coleman, 390 U.S. 599 (1968). In Coleman, the Court reaffirmed (at 602) the prudent-man standard of determining whether a "discovery" has been made, and said (at 602) that "profitability is an important consideration in applying the prudent-man test * * *." In expressing that standard in 1894 in Castle v. Womble, 19 L.D. 455, the Secretary said (at 457) that "the requirement relating to discovery refers to present facts, and not to the probabilities of the future" and that:

> where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * * 10/

The prudent-man standard has been sustained by this Court on a number of occasions. Palmer v. The Dredge Corp. (Nos. 21435 and 21436, June 26, 1968) not yet reported; White v. Udall (No. 21766, June 17, 1968) not yet reported; Coleman v. United States, 363 F.2d 190, 196-197 (1966), aff'd on reh., 379 F.2d 555 (1967), rev'd on other grounds, United States v. Coleman

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10/ Willingness by the individual mineral claimant to continue, to persist will not suffice. "'[T]he question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. * * *'" Chrisman v. Miller, 197 U.S. 313, 322 (1905).

supra; Mulkern v. Hammitt, 326 F.2d 896, 897 (1964); Adams v. United States, 318 F.2d 861, 870 (1963); Multnomah Mining, Milling & D. Co. v. United States, 211 Fed. 100, 102 (1914); Steele v. Tanana Mines R. Co., 148 Fed. 678, 680 (1906). The standard was applied by this Court (as approved by the Supreme Court in Coleman, supra), in White v. Udall (C.A. 9, No. 21766, June 17, 1968) not yet reported, as against a contention that "the Secretary's decision erroneously applied the prudent-man test by including the requirement that to be a valid mining claim there must be a reasonable prospect that it will be a profitable venture."

In both Udall v. Snyder and Udall v. Garula (C.A. 10, Nos. 9671 and 9681, respectively, May 24, 1968) not yet reported, the trial court had rejected the requirement as an erroneous test of mineral discovery and had deemed the evidence sufficient to overturn the administrative determination of no discovery. The Tenth Circuit reversed summarily, citing United States v. Coleman, 390 U.S. 599 (1968) and in Snyder elucidated:[11/]

11/ Thus, the three cases on which the district court here relied have since been reversed. The opinions of the district court in Snyder and Garula are reported at 267 F.Supp. 110 and 268 F.Supp. 910, respectively.

> The Supreme Court now makes it plain to us that in the case at bar the Secretary applied the approved standard in determining that for want of a valuable mineral deposit no discovery had been made by appellant at the time the land in question was validly withdrawn; that the administrative determination was binding upon the court if supported by substantial evidence on the whole record; that the government witnesses were competent to testify as experts with reference to the prudent man test, and that the Secretary's decision was supported by substantial evidence on the whole record and was not clearly erroneous.

The cases thus make plain that the element of value is essential in ascertaining whether a valid discovery has been made under the prudent-man standard. Here, the evidence is undisputed that the exposed mineralization is valueless. Hence, in applying the prudent-man standard, the Secretary was correct in concluding that Henault had not made a valid discovery.

II

THE SECRETARY'S DECISION RESTED UPON THE CORRECT DISCOVERY STANDARD, WAS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE, AND SHOULD HAVE BEEN AFFIRMED BY THE DISTRICT COURT

The first requirement for a discovery, proof of existence of the mineral, and the second, a showing that it was valuable under the prudent-man standard, were the legal principles applied by the Secretary in this case (R. 38, 43, 46, 50-51). Also, the Secretary carefully reviewed the evidence, set forth above at pages 28-33. A reading of that review demonstrates

that his decision is based on substantial evidence. It was not the function of the district court to reweigh the evidence. It follows, we believe, that the district court erred in reversing the Secretary's decision. "Whether the tract * * * was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. [Citations omitted.]" Cameron v. United States, 252 U.S. 450, 464 (1920).[12/] See also Davis v. Nelson, 329 F.2d 840, 846 (C.A. 9, 1964); Adams v. United States, 318 F.2d 861, 873 (C.A. 9, 1963); White v. Udall (C.A. 9, No. 21766, June 17, 1968) not yet reported; Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959).

To the extent that the Secretary's decision rested on construction of the mineral statutes, which were committed to him by Congress to administer, and which were here supported by a long history of consistent administrative application, that decision is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16-18 (1965), and cases cited there. See also Udall v. Battle Mountain Co., 385 F.2d 90, 94-96 (C.A. 9, 1967), cert. den., 390 U.S. 957; Rundle v. Udall, 379 F.2d 112, 113 (C.A. D.C. 1967), cert. den., 389 U.S. 845, adopting the reasons stated in

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12/ As in this Court's recent Palmer v. The Dredge Corp., case (Nos. 21435 and 21436, June 26, 1968) not yet reported, there is at least substantial evidence to support the Secretary's decision even if it is not conclusive.

Bowman v. Udall, 243 F.Supp. 672, 680-683 (D. D.C. 1965), aff'd sub nom. Hinton v. Udall, 364 F.2d 676 (C.A. D.C. 1966). Cf. Udall v. Oelschlaeger, 389 F.2d 974, 976 (C.A. D.C. 1968), cert. den. (S.Ct. No. 1354, June 10, 1968).[13/]

The district court believed that the Secretary's articulation of the standard "goes beyond the test" in considering "reasonable expectation of developing a profitable mine" (R. 149).[14/] That belief is essentially identical to that of appellant's in White v. Udall (C.A. 9, No. 21766, June 17, 1968)

13/ Of course the Secretary was not bound by the Hearing Examiner's views of fact, law, policy, or discretion, as the district court here correctly noted (R. 150, note 17). The Administrative Procedure Act, 5 U.S.C. (1964 ed.) Supp. II, secs. 701-706, did not change the Secretary's ultimate authority as to these matters. Palmer v. The Dredge Corp. (C.A. 9, Nos. 21435 and 21436, June 26, 1968) not yet reported; Standard Oil Co. of California v. United States, 107 F.2d 402, 415 (C.A. 9, 1940), cert. den., 309 U.S. 654; United States v. Standard Oil Co. of California, 20 F.Supp. 427, 447-450 (S.D. Cal. 1937); Henrikson v. Udall, 229 F.Supp. 510, 512 (N.D. Cal. 1964), aff'd, 350 F.2d 949 (C.A. 9, 1965). See F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955); 2 Davis, Administrative Law Treatise (1958) sec. 10.04, pp. 18-26.

14/ The district court's further statement (R. 146), that "the Government has in effect required a showing of commercial value in this," is ambiguous. There has been no requirement in this case beyond that of the relevant statutes and the decided cases. The same charge was made in Udall v. Snyder, 267 F.Supp. 110 (D. Colo. 1967); and Udall v. Garula, 268 F.Supp. 910 (D. Colo. 1967). The Secretary has been sustained in both cases. (C.A. 10, Nos. 9671 and 9681, respectively, May 24, 1968) not yet reported. The aspect of "marketability," also noted by the district court (R. 145, note 12), is simply not involved in this case. The marketability of gold was not in issue. Failure of its occurrence in quantity and quality, with a present or prospective value, was.

not yet reported: "The appellant here contends that the Secretary's decision erroneously applied the prudent-man test by including the requirement that to be a valid mining claim there must be a reasonable prospect that it will be a profitable venture." The reasonable expectation of a "profitable venture" is necessarily embraced in the standard, as the discussed cases show. Citing Henrikson v. Udall, 350 F.2d 949, 950 (C.A. 9, 1965), this Court answered the contention as follows:

> The latest Coleman opinion controls the issues of the instant case in that the Supreme Court approved the standards used here by the Secretary. The proper standards were applied, there is substantial evidence to support the Secretary's decision that there was no valid discovery, and therefore his decision is binding on this court.

That is this case and the result should be the same. See also Palmer v. The Dredge Corp. (C.A. 9, Nos. 21435 and 21436, June 26, 1968) not yet reported.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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